OFFICE OF
INSPECTOR GENERAL
U.S. DEPARTMENT OF THE INTERIOR

MAR 19 2014

The Honorable Doc Hastings
Chairman, Committee on Natural Resources
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your March 13, 2014 letter to the Department of the Interior Office of Inspector General (OIG) requesting production of certain documents. That letter refers to your December 23, 2013 letter to the OIG that requested documents relating to the OIG investigation of the Office of Surface Mining Reclamation and Enforcement's efforts to revise its Stream Protection Rule.

After receiving your December 23 letter, we began producing the requested documents to the Committee. On January 6, 2014, OIG General Counsel had a conversation with your Committee's Senior Counsel explaining that the Department was asserting to the OIG that statements by Department personnel regarding *current* rulemaking, as opposed to past rulemaking, constituted privileged information under the deliberative process privilege. OIG General Counsel further explained to your counsel that we were redacting some of the information the Department claimed was privileged pursuant to a longstanding understanding between the Department and the OIG. We did not then, and do not now, take a position, however, on the ultimate validity of the Department's claim of privilege.

Your current letter states that the OIG is "withholding from Congress the notes and transcripts of its interviews with the new contractors (identified as Attachments 97, 98, 101,102) and has redacted portions of the report that would explain what those problems are." To the contrary, we are not withholding any documents from the Committee. Once the Committee advised us that it had not received the above referenced documents, we resent them, having previously sent them via email of January 30, 2014. And we have recently provided the Committee the few remaining documents it requested. Moreover, contrary to the assertion contained in your letter, the OIG did not identify "problems" with the current efforts to revise the Stream Protection Rule.

Your letter also asserts, "To date, a claim of Executive Privilege has not been asserted as a basis for the continued withholding of this information." This assertion fails to recognize how the Executive Branch asserts a claim of executive privilege. We note that every President since Lyndon Johnson has asserted executive privilege in shielding documents from Congress. (See *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments*; August 21, 2012, Congressional Research Service, available at http://www.fas.org/sgp/crs/secrecy/R42670.pdf) The practice of recent administrations is that only the President can assert executive privilege and will only do so after receiving a

recommendation from the Attorney General. The current practice also involves efforts to resolve disputes through a judicially recognized process of accommodation. This process has been described by one Attorney General as follows: "The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch." (*Assertion of Executive Privilege*, 5 Op. O.L.C. 27, 31 (1981).

Whether the privilege is properly asserted by an executive agency in this matter involving ongoing rulemaking can only be resolved by the parties to this dispute – your Committee and the Department, or through litigation in federal court. The OIG does not take a position in such a dispute. We note, however, that the Department's claim does not appear to be specious. In 1981 Attorney General William French Smith recommended and President Reagan asserted executive privilege in response to subpoenas from a congressional committee for documents concerning ongoing deliberations regarding regulatory action by the Interior Secretary. (See *Assertion of Executive Privilege*, 5 Op. O.L.C. 27). As we have explained to your Committee before, we cannot usurp the President's power to assert executive privilege if other efforts to resolve the dispute fail.

Your letter asserts that our actions to avoid getting pulled into an ongoing dispute between members of your Committee and the Department is indicative of our lack of independence. We feel certain that the opposite is true – that our independence and neutrality on a policy dispute between Committee members and the Department can only be advanced by the position we have repeatedly expressed: the information the Committee seeks belongs to the Department and the Committee should be seeking that information from the Department, not from the OIG. Moreover, if the OIG did not allow the Department to assert privileges it believes are legitimate, we believe that our access to future documents and our ability to conduct meaningful interviews in the future would undoubtedly be jeopardized.

In conclusion, we reiterate that both the assertion of privilege and the authority to waive privilege lies with the Department, not with the OIG. We respectfully refer the Committee to the Department to request the redacted information and resolve the differences of opinion regarding claims of privilege.

Sincerely,

Mary L. Kendall
Deputy Inspector General

U.S. House of Representatives
Committee on Natural Resources
Washington, DC 20515

March 13, 2014

Mary Kendall
Deputy Inspector General
Office of Inspector General
U.S. Department of the Interior
1849 C Street, NW 20240

Dear Ms. Kendall:

On December 23, 2013 the Committee on Natural Resources ("Committee") sent a letter to the Office of Inspector General ("OIG") for the Department of the Interior ("Department") requesting a complete and unredacted copy and underlying attachments for an OIG report of investigation into the Office of Surface Mining, Reclamation and Enforcement's ("OSM") efforts to rewrite the 2008 Stream Buffer Zone rule. The request also sought drafts of and edits to the OIG report, as well as entries from the OIG's case management system for the report.

For over three years, the Committee has had serious concerns about the process being used to rewrite this rule and the impact that a new rule would have on jobs and the economy. In the past five years, the Obama Administration has spent over $9 million in response to litigation with environmental groups challenging the 2008 rule, has fired contractors working on the rule when the potential job loss numbers became publicly known, and has not yet even issued a proposed rule after all these years and millions of dollars spent. The OIG's December 2013 report confirmed many aspects about the Committee's own oversight into this wasteful and mismanaged rulemaking process, summarized in a 2012 majority staff report.[1]

In its January 6, 2014 response to the Committee's request, the OIG stated it was withholding certain documents and information from the Committee because the Department "identified the material as pre-decisional and privileged." It is troubling to note that the OIG's investigation appears to have found that problems persist with the Department's handling of its new contractors – an entire section of the report is entitled "Issues with the New Contract." And yet, the OIG is withholding from Congress the notes and transcripts of its interviews with the

[1] Majority Staff Report, "The President's Covert and Unorthodox Efforts to Impose New Regulation on Coal Mining and Destroy American Jobs," issued September 20, 2012. Available at: http://naturalresources.house.gov/uploadedfiles/staffreport-112-osm_sbzr.pdf.

new contractors (identified as Attachments 97, 98, 101, and 102) and has redacted portions of the report that would explain what these problems are.

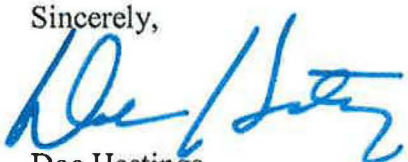
The OIG's unwillingness to date to provide the Committee with a complete and unredacted copy of its final report and drafts, all related attachments, and entries from its case management system is unacceptable and is only the latest instance of the OIG's cooperative approach at interacting with the Department – at the expense of fulfilling its statutory obligation to be an independent watchdog and to keep Congress fully informed of management problems and fraud, waste, and abuse within the Department. Allowing the Department to screen the information the OIG provides to Congress is counterproductive and undermines not only the OIG's role in fostering integrity and accountability within the Department but also its relationship with Congress.

It is imperative that the OIG provide the requested information so Congress can fully understand the extent to which the Department is continuing to mismanage the rulemaking process. Without a full accounting of the issues with the current contractor, which the unredacted versions of the OIG report and attachments would provide, there can be no confidence that the Department is being a responsible steward of taxpayer dollars or that its efforts would prevent further litigation or regulatory uncertainty.

As the Committee has expressed to the Department and the OIG previously, generalized claims of Executive Branch confidentiality interests and common law privileges do not justify withholding information from Congress. To date, a claim of Executive Privilege has not been asserted as a basis for the continued withholding of this information.

This letter affords the OIG a final opportunity to produce an unredacted copy of its December 20, 2013 report, unredacted copies of relevant attachments (including Attachments 97, 98, 101, and 102), all drafts and edits to the OIG report, and entries from the case management system. It is expected that the OIG will fully comply with the Committee's voluntary request no later than 12 noon on March 17, 2014, otherwise production of the requested material may be compelled.

Sincerely,



Doc Hastings
Chairman